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UNITED STATES DISTRICT COURT

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8 DISTRICT OF NEVADA

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10 IN RE:) CASE NO.: 2:10-cv-00781-JCM-PAL
11)
12 STEVEN D. MOLASKY,) Bankruptcy Case No. BK-S-08-14517-MKN
13)
14 Debtor.) Adversary No. 08-01246-MKN
15 AUGUSTINE C. BUSTOS,)
16)
17 Appellant,)
18) DECISION AND ORDER
19)
20 v.)
21)
22 STEVEN D. MOLASKY,)
23)
24 Appellee.)
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28)

This appeal is from an order dismissing intervenor, Augustine C. Bustos, supported by a memorandum decision, entered September 28, 2009 by the Bankruptcy Court for the District of Nevada, in Adversary No. 08-01246-MKN.

29
30 **Background**

31 Steven D. Molasky (“Molasky”) filed a voluntary chapter 11 petition on May 3, 2008.
32 On the 523 deadline, August 11, 2008, One Cap Holding Corporation, a Nevada corporation
33 (“OneCap”) filed a complaint commencing the adversary proceeding from which this appeal was
34 taken. The subject matter of the complaint included a note and deed of trust defined as the
35 “Ellington Note” and the “Ellington Deed of Trust.” The W. Leslie Sully, Jr., Chtd. Profit
36

1 Sharing Plan (“Sully Plan”) and Augustine C. Bustos (“Bustos”) were owners, by assignment, of
 2 the Ellington Note in the face amount of \$17,000,000.00 and beneficiaries under the Ellington
 3 Deed of Trust securing the Note. As such, the Sully Plan and Bustos were creditors of Molasky.
 4

5 On October 31, 2008, an order was entered allowing Bustos to intervene in the adversary
 6 proceeding with all rights and remedies as those granted to OneCap as they pertained to any and
 7 all claims of Bustos against Molasky, but prohibiting Bustos from filing a separate complaint
 8 therein.

9 On May 11, 2009, an order was entered allowing OneCap’s attorneys to withdraw.
 10 Thereafter, on June 4, 2009, OneCap failed to appear at a calendared scheduling conference; and
 11 order was entered on June 15, 2009 requiring OneCap to show cause why OneCap should not be
 12 dismissed for failure to obtain counsel to prosecute the adversary proceeding. OneCap failed to
 13 appear and show cause and on July 21, 2009, an order was entered dismissing the adversary
 14 proceeding solely as to OneCap.
 15

16 Thereafter, Molasky moved to dismiss Bustos from the adversary proceeding and on
 17 September 28, 2009 an order was entered dismissing Bustos. Prior to the order dismissing
 18 Bustos, however, through a stipulation and order signed in April, 2009, the Sully Plan and
 19 Molasky agreed to allow Sully to join the adversary proceeding as a plaintiff, effective
 20 immediately. The stipulation and order was entered on August 14, 2009, (“August 14th order”).
 21

22 Following the dismissal of Bustos, on November 9, 2009, Molasky moved to dismiss the
 23 Sully Plan. On May 13, 2010, the bankruptcy court entered an order dismissing the Sully Plan
 24 from the adversary proceeding.
 25

26 At no time between the dismissal of OneCap and the entry of the order dismissing the
 27 Sully Plan, did the bankruptcy court enter an order dismissing the adversary proceeding in its
 28 entirety. The bankruptcy court retained subject matter jurisdiction over the adversary case.

1 OneCap and Bustos were dismissed as parties only. It was not until entry of the order dismissing
 2 the Sully Plan that a final, appealable order was entered.
 3

4 **Discussion**

5 The order allowing Bustos to intervene specifically granted Bustos all rights and
 6 remedies of OneCap under its complaint, but prohibited Bustos from filing his own complaint in
 7 the adversary proceeding. The stipulation and order through which the Sully Plan was admitted
 8 as a plaintiff contained no such limitations. The agreement language of the August 14th order
 9 allowed the Sully Plan to enter the adversary proceeding as a plaintiff.

10 Upon entry of the August 14th order, beginning on August 14, 2009, the Sully Plan was
 11 the plaintiff in the proceedings with full right and authority to prosecute its claims in the
 12 adversary proceeding. With the entry of the Sully Plan as plaintiff, Bustos remained a viable
 13 intervenor.

14 Unlike the situations presented in the cases of *Fuller v. Volk*, 351 F.2d 323 (3rd Cir.
 15 1965) and *Benavidez v. Fong Eu*, 34 F.3d 825 (9th Cir. 1994), the Sully Plan was ordered
 16 admitted as a party plaintiff to the adversary action before the dismissal of Bustos. The
 17 adversary proceeding was no longer dependent upon OneCap as the party plaintiff. The Sully
 18 Plan was then and thereafter authorized to define the parameters of the adversary proceeding and
 19 to prosecute its' claims.

20 The adversary proceeding underlying this appeal and the bankruptcy court's subject
 21 matter jurisdiction survived the dismissal of OneCap as a plaintiff. At all times until the
 22 dismissal of the Sully Plan, the bankruptcy court and the parties treated the adversary proceeding
 23 as an open case. Before the dismissal of Bustos, as an intervenor, the bankruptcy court entered
 24 the August 14th order allowing the Sully Plan to intervene as a plaintiff. With the entry of the
 25 Sully Plan as plaintiff in the adversary proceeding, there was no basis for the dismissal of either
 26 Bustos as an intervenor, or the Sully Plan as a plaintiff.

1 Therefore,

2 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the orders and the
3 memorandum decisions supporting same of September 28, 2008 and May 13, 2010 respectively
4 are hereby reversed; and it is

5 FURTHER ORDERED, ADJUDGED AND DECREED that the matter is remanded to
6 the bankruptcy court for further proceedings consistent with this decision and order.

7 DATED this 23rd day of December, 2010.

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9 Dennis C. Mahan
10 UNITED STATES DISTRICT JUDGE

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